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June 19, 1997

William F. Caton
Acting Secretary
Office of the Secretary
Federal Communications Commission
Washington, DC 20554

Re: CC Docket No. 92-237

Dear Mr. Caton:

Attached please find an original and four copies of Joint Comments filed by CGI and Communigroup ("the Companies") in support of VarTec's Petition for Reconsideration in the above-captioned proceeding. The Companies are filing Exhibit Two-A and Exhibit Two - B of the Joint Comments under separate cover, with a Request that Information be Withheld from Public Inspection, on the basis that Exhibit Two - A and Exhibit Two - B contains proprietary commercial information. If you have any questions or require further information, please do not hesitate to contact the Companies' undersigned counsel.

Sincerely,

James U. Troup
Aimee M. Cook

Counsel for CGI and CommuniGroup

Enc.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JUN 19 1997
Federal Communications Commission
Office of Secretary

In the Matter of	)	
	)	
Administration of the	)	CC Docket No. 92-237
North American Numbering Plan	)	
Carrier Identification Codes ("CICs")	)	

JOINT COMMENTS OF CGI AND COMMUNIGROUP

CGI and CommuniGroup ("the Companies"), by and through their attorneys, file these comments in support of the Petition for Reconsideration filed by VarTec Telecom, Inc. ("VarTec") in the above-captioned proceeding. For the reasons set forth herein, the Companies urge the Commission to reconsider and vacate its mandate eliminating five digit Carrier Access Codes ("CACs"),[1] and to adopt a grandfathering plan which allows for the contemporaneous use of both five and seven digit CACs.

I. INTRODUCTION

The Companies are small interexchange carriers ("IXCs") which provide interexchange service accessible by dialing a five digit CAC. The last three digits of the CAC are a carrier identification code ("CIC") assigned to each Company.[2] A large percentage of each Company's customers access interexchange service through this "dial-around" method.

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[1] Administration of the North American Numbering Plan Carrier Identification Codes (CICs), Second Report and Order, CC Docket No. 92-237, FCC 97-125 (rel. April 11, 1997) (hereinafter referred to as the "Order").

[2] CGI owns CAC numbers 10778, 10975, and 10998; CommuniGroup owns CAC numbers 10268 and 10885.

II. THE COMMISSION SHOULD ADOPT A GRANDFATHERING PLAN WHICH ALLOWS FOR THE CONTEMPORANEOUS USE OF FIVE AND SEVEN DIGIT CACS.

In its Petition for Reconsideration, VarTec proposed that since LECs are technologically capable of recognizing both five and seven digit CACs, seven digit codes should supplement, rather than replace five digit codes. The Companies strongly support this proposal.

Grandfathering five digit CACs would result in an increase in the number of available CACs in the long run, which is the goal of the Commission in this proceeding.[3] Similar software and switch reprogramming that currently allows switches to read both three digit and four digit CICs beginning with a "5" or "6" will allow for the implementation of VarTec's grandfathering plan. To comply with the Commission's Report and Order, all switches should be able to read a seven digit CAC by January 1, 1998. Under VarTec's grandfathering plan, all three digit CICs starting with "1" would be taken out of use so that a switch does not confuse 101XX with 101XXXX. Then, a switch capable of translating a five-digit CAC and a seven-digit CAC will be able to properly route the following CACs: 100XX, 102XX, 103XX, 104XX, 105XX, 106XX, 107XX, 108XX, 109XX, 1010XXX, 1011XXX, 1012XXX, 1013XXX, 1014XXX, 1015XXX, 1016XXX, 1017XXX, 1018XXX and 1019XXX.

VarTec's grandfathering plan would require the reassignment of three-digit CICs that have "1" as the first digit. However, only 70 such CICs have been assigned, making reassignment relatively easy. Most carriers that have been assigned three digit CICs starting with "1" also have been assigned three digit CICs starting with numbers other than "1" and can

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[3] See NPRM at para. 2.

continue to use those CICs under VarTec's grandfathering plan. By allowing the use of both five digit CACs where the CICs do not begin with "1" and seven digit CACs, the Commission would make 900 more CACs available for use than under its current expansion plan. Thus, VarTec's plan comes much closer to achieving the goal of the Commission's NPRM than does the Commission's plan.

The Commission has expressed concern that grandfathering would interfere with four digit CICs that begin with the numbers "5" or "6."[4] The Commission has already assigned four digit CICs, beginning with the numbers "5" or "6", however, and those CICs are in active use. VarTec pointed out in its Petition for Reconsideration that it has used its three digit CICs beginning with "5" and "6" (595 and 636) without any technical problems relating to use of four digit CICs beginning with the same numbers. Thus, coexistence, as outlined in VarTec's Petition for Reconsideration, is working today, providing further evidence that it will work in the future.

The Commission concluded in the Report and Order that the dialing disparity between five and seven digit CACs during the transition period did not violate either Section 201(b) of the Act's prohibition against unreasonable practices or Section 202(a)'s prohibition against unreasonable discrimination.[5] The Commission concluded that "the transition is reasonable and necessary to avoid a flash-cut conversion to four digit CICs which would be contrary to the public interest."[6] The Companies agree with the Commission's determination that the difference

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4 See Order at para. 46.

5 See Order at para. 32.

6 Id.

in dialing a five digit CAC and a seven digit CAC is not unreasonable under the Act, and that converting all five digit CACs to seven digits "would be contrary to the public interest."

This conclusion is not limited to the CAC conversion transition period. The minimal distinction between dialing five digit CACs and seven digit CACs would not pose a hindrance to competition, and is reasonable under the Act. All interexchange carriers may compete to become a subscriber's primary interexchange carrier ("PIC") which allows calls to be placed by dialing fewer digits and no CAC. However, eliminating all five digit CACs will suppress competition by creating customer confusion and frustration, ultimately leading to the exclusive use of entrenched presubscribed long distance carriers, and the severe diminution of business for smaller dial-around long distance telephone companies, such as the Companies.

CAC expansion will result in increased customer confusion and dialing time for customers who are used to dialing five digit CACs. Five digit CAC customers will likely be confused by "re-education" materials sent by dial-around long distance carriers. These education programs will place an onerous burden on small dial-around carriers, who must expend significant resources to produce such "educational" materials. For example, CommuniGroup has contracts with schools and banks that rely on the dialing of its CACs. If CommuniGroup's CACs are changed, it will need to educate not only existing users, but all alumni and bank depositors that someday in the future may attempt to rely on information they have already received concerning how to use such affinity programs. The increased time and effort in dialing

a longer CAC will impair dial-around carriers' ability to attract customers. Customers used to using five digit CACs will perceive seven-digit CACs as too cumbersome, and will be more likely to opt for presubscribed long-distance service.

Eliminating five-digit CACs will push smaller IXCs out of the dial-around arena, and will force them to compete to become the PIC, thereby exposing the Companies to large IXCs' predatory marketing techniques. Large IXCs target the PIC customers of smaller IXCs, and offer substantial incentives (such as $100 rebate coupons) to entice those customers to switch to the larger IXC. The larger IXC obtain rosters of the smaller IXC's PIC customers and create target lists of potential customers. The Commission's regulations will seriously impair the Companies' ability to compete with larger IXCs through its dial-around service, and will leave the Companies with no option other than competing with entrenched presubscribed long distance carriers to become the PIC. The customer confusion and frustration created by the Commission's plan widens the competitive gap between presubscribed carriers, such as AT&T, and dial-around service providers, so that the dial-around carriers' customers will opt for the convenience of presubscribed long-distance carriers.

The Commission expressed concern that allowing five digit CACs to operate contemporaneously with seven digit CACs would create unreasonable discrimination after the transition period.[7] Yet, VarTec's grandfathering plan preserves the current state of competition by allowing five digit CAC operators to avoid suffering a diminution of business from the customer confusion caused by a full-scale conversion to seven digit CACs. Furthermore, as

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[7]See Order at para. 32.

discussed supra, all interexchange carriers can compete to become a subscriber's PIC, which allows calls to be placed by dialing fewer digits and no CAC.

As VarTec points out, the grandfathering plan is based on the concept of "first-come, first-served," which the Commission has consistently held to be reasonable under the Act.[8] In the N11 Code proceeding, the Commission indicated that there existed no legal or regulatory impediment to assignment of N11 codes on a first-come, first-served basis, and affirmed that this method of assignment would be reasonable and non-discriminatory.[9] Thus, allowing holders of five digit CACs to retain the CACs they have been assigned from an expanded pool of five and seven digit CACs is consistent with the Commission's equitable policy of first-come, first-served.

For many years prior to equal access, the FCC allowed AT&T's customers to receive service from AT&T without dialing extra digits although customers of AT&T's competitors were required to dial extra digits. Moreover, customers of competitors to the Bell Operating Companies ("BOCs") for intraLATA toll service have been required for several years to dial extra digits while the BOCs' customers have not. While in most states the Companies still cannot be selected as the PIC for intraLATA toll calls without dialing a CAC, the FCC has never, for the purpose of dialing parity, required consumers to dial a CAC in order to place such calls

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[8] See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499 (1996) ("Local Competition Order"); Use of N11 Codes and Other Abbreviated Dialing Arrangements, First Report and Order and Further Notice of Proposed Rulemaking, FCC 97-51 (rel. February 19, 1997) ("N11 Order").

[9] N11 Order at para. 7 (citing Letter from Robert J. Pettit, FCC General Counsel, to David J. Markey, Vice President, BellSouth, dated May 4, 1992).

using a BOCs facilities. In both contexts, the FCC concluded that it would not serve the public interest to require the customers of AT&T or the BOCs to dial extra digits merely to require all consumers to dial the same number of digits. Likewise, it would not serve the public interest for the Companies' customers to be forced to dial more than a five digit CAC merely because CACs have been expanded to seven digits for some carriers.

VarTec's grandfathering plan is non-discriminatory because it is founded on the equitable principle of first-come, first-served. Holders of five digit CACs fairly received their CAC assignments on a first-come, first-service basis deemed by the Commission to be reasonable. The Commission should not allow five digit CAC holders to be negatively impacted by the entrance of seven digit CAC users into the long distance market.

III. THE COMMISSION'S DECISION IS ARBITRARY AND CAPRICIOUS IN VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT

Actions by an agency which are contrary to the stated goals of that agency are deemed to be "arbitrary and capricious." Such actions violate the Administrative Procedures Act, and are therefore unenforceable.[10] The Commission's decision to eliminate five digit CACs directly contravenes the goals articulated by the Commission in the CIC proceeding.[11] Thus, the order eliminating five digit CACs must be vacated.

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[10] 5 U.S.C.§ 706.

[11] Bechtel v. FCC, 10 F.3d 875, 885-886 (D.C. Cir. 1993).

The Commission's goal in managing CICs is the promotion of competition in the interstate telecommunications marketplace.[12] It initiated the rulemaking in order to ensure that an adequate number of CICs would be available for "new services and technologies and to support continued economic growth."[13] The decision to eliminate five digit CACs fails to accomplish this goal, however, and is likely to thwart, rather than promote competition in the interstate marketplace. Eliminating five digit CACs will decrease the pool of available CACs, and will result in consumer confusion and loss of revenues for dial-around interexchange carriers -- making it more difficult for these small companies to compete. Accordingly, the Commission should reconsider and vacate its arbitrary and capricious decision to eliminate five digit CACs.

V. ELIMINATION OF FIVE DIGIT CACs VIOLATES THE COMPANIES' CONSTITUTIONALLY PROTECTED RIGHTS

A. The Commission's Elimination of Five Digit CACs is a Taking of Property Without Just Compensation in Violation of the Fifth Amendment

The Fifth Amendment of the U.S. Constitution provides that "private property [shall not] be taken for public use, without just compensation." It is well accepted that intangible property interests, such as goodwill, trade secrets and contract rights, are subject to the same Fifth Amendment protections from regulatory actions as are more conventional forms of physical

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[12] See Order at para. 2 (citing Exchange Network Facilities for Interstate Access(ENHA), Memorandum Opinion and Order, 71 FCC 2d 440 (1979); MTS and WATS Market Structure, Report and Third Supplement Notice for Inquiry and Proposed Rulemaking, 81 FCC 2d 177 (1980); Electronic Implications and Interrelationships Arising from Policies and Practices Relating to Customer Interconnections, Jurisdictional Separators and Practices Relating to /Customer interconnection, Jurisdictional Separations and Rate Structures, Docket No. 20003, Second Report (1980).

[13] NPRM at para. 2.

property.[14] It has long been recognized that trademarks and service marks are property rights, entitled to all of the protections extended to other forms of private property.[15] A government taking of a trademark without providing just compensation is a clear violation of the Fifth Amendment to the Constitution.[16] The right "to engage in a particular trade or business" is "property" protected by the Fifth Amendment, as are other rights associated with a citizen's chosen trade or profession.[17] The courts have recognized, for example, that a license to fish in particular waters, and long-term state leases used for oyster propagation, are property rights which are compensable under the Fifth Amendment if taken by the federal government.[18]

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[14] Kimball Laundry Co. v. United States, 338 U.S. 1, 8-12 (1949) (recognizing goodwill as a property interest); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003 (1984) (trade secrets are property rights protected under takings clause).

[15] See e.g., The Trademark Cases, 100 U.S. 82 (1879) ("The right to adopt and use a symbol or a device to distinguish the goods or property made or sold by the person whose mark it is, to the exclusion of use by all other persons, has been long recognized by the common law and the chancery courts of England and of this country, and by the statutes of some of the States. *It is a property right* for the violation of which damages may be recovered in an action at law . . . .") (emphasis added).

[16] Maltina v. Cawy Bottling Co., 462 F.2d 1021, 1027 (5th Fir. 1972); see also Friedman v. Rogers, 440 U.S. 1, 12 n.11 (1979) (recognizing trade names as valuable property rights of a business, protected from appropriation by others, but noting that no claim of a taking had been raised in that case).

[17] Greene v. McElroy, 360 U.S. 474, 491 (1959); Chalmers v. City of Los Angeles, 762 F.2d 753, 756-757 (9th Cir. 1985); see also Goldsmith v. United States, 270 U.S. 115 (1926) (right of a certified public accountant to practice before the Board of Tax Appeals); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964) (right to obtain a retail liquor store license); Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961), cert. denied, 368 U.S. 930 (1961) (right to attend a public college).

[18] See Todd v. United States, 155 Ct. Cl. 111 (1961); Avenal v. United States, 100 F.3d 933 (Fed. Cir. 1996).

"Property" interests also include a broad range of interests that are secured by "existing rules or understandings."[19]

By prohibiting the use of five digit CACs, the Commission is depriving the Companies of all value associated with their established CACs. This represents a per se categorical taking of property rights under Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). In Lucas, the South Carolina state legislature enacted a statute which barred landowners from erecting any permanent habitable structures on their land for the purpose of protecting people and property from storms, high tides and beach erosion. The Supreme Court held that when government calls upon the owner of property to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.[20]

Lucas is analogous to the instant case. As in Lucas, after investing substantial time and millions of dollars in hiring employees, acquiring equipment and leasing facilities in order to apply their CACs to productive use, the Companies are faced with the prospect of sacrificing all economically beneficial use of their CACs.

Thus, as explained in more detail below, the Commission's action in stripping the Companies of their five digit CACs represents an uncompensated taking of several property interests. These property interests include the goodwill established by the Companies, the Companies' right to use service marks they have established through the use of their CACs, and their entitlement to engage in a chosen business through use of CACs in which they have made

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[19] Perry v. Sindermann, 408 U.S. 593, 601 (1972).

[20] Lucas, 505 U.S. at 1019.

significant financial investment with the reasonable expectation that they could continue to reap the benefits of that investment. Moreover, the Commission's mandate robs the Companies of their property interest, established by existing Commission rules and understandings, in using their five digit CACs.

(i) Good Will

The Companies have relied heavily on the promotion of their CACs in building their respective businesses. They have incurred millions of dollars in marketing costs, including the development, production and mailing of promotional brochures, explanatory letters, and stickers, all of which prominently feature their CACs and which are carefully designed to communicate information about their CACs to consumers.[21] The Companies' customers are both familiar and comfortable with these CACs. Indeed, the Companies' CACs are the only means by which many of their customers recognize their service. These CACs have come to represent all of the goodwill that the Companies have established with these customers. If the CACs are taken away by the FCC's action, so will that goodwill be taken. The Companies will be forced to start from scratch. After spending years and tremendous sums of money carefully cultivating a customer base of people who know that they will receive the highest quality service when they dial a particular CAC, the Companies will be left with customers who call that CAC after January and hear an error message.

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[21] Samples of those materials are attached as Exhibit One - A and Exhibit One - B; the amount that each Company has spent in marketing its services through materials such as these is identified in Exhibit Two- A and Exhibit Two - B.

(ii) Service Marks

Through their promotional efforts, the Companies have achieved the goal of creating an association in customers' minds between their five digit CACs and their respective businesses. The CACs are the symbols by which each Company is recognized by the public; they have become the Companies' service marks, entitled to all of the protections of the trademark laws.[22] These trademarks are, in most cases, more closely identified with a particular Company's service, than the Company's own name. Thus, the Commission's mandate interferes with the Companies' significant property interests in their five digit CACs.

(iii) Entitlement to Engage in a Chosen Business

The Companies have made significant investments in marketing efforts centered around promotion of their CACs with the expectation of reaping a return on their investments. Prior to the institution of this proceeding, the Companies had no reason to suspect that the Commission would eliminate the CACs which have enabled them to compete with entrenched carriers and which are the lifeblood of their respective businesses. In reliance on exclusive rights to the CACs which they owned, the Companies went forward with their investment and based their business plans on the use of five digit CACs.[23] The Fifth Amendment mandates just

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[22] See American Express Travel Related Services Co. v. Accu-Weather, Inc., 849 F. Supp. 233, 240 (S.D.N.Y. 1994) (recognizing service mark rights in a particular telephone number promoted in the sale of the telephone number owner's services).

[23] For example, CommuniGroup employs affinity group marketing methods, contracting with banks, universities and other large organizations which agree to market CommuniGroup's five digit CACs to its members. CommuniGroup risks losing a sizable portion of its client base once five digit CACs are eliminated since the Commission has not implemented an intercept message requirement designed to alert customers attempting to use five digit CACs that they must dial a different CAC. CommuniGroup's limited resources prevent it from successfully

compensation where a government action interferes with a reasonable investment-backed expectation and substantially diminishes the value of property owned by a business.[24] The Commission's mandate does not merely interfere with the Companies' reasonable expectations for a return on their investments, or simply diminish the value of their CACs. It destroys those expectations and eliminates that value. Elimination of the Companies' five digit CACs will deprive the Companies of their property, and their liberty to pursue a chosen line of business (to provide an alternative long distance telephone service to the American people). The same can be said for the other CAC owners who will be impacted in a similar manner by the Commission's action. Each will have a claim for a taking. Although the Companies and other CAC owners will have a claim under the Tucker Act to pursue in the Court of Claims, the Commission should act now to eliminate the need to resort to that remedy.

(iv) Property Interest Established by Existing Commission Rules and Understandings

Under the "existing rules or understandings" embodied in the Communications Act, the Companies' use of their respective CACs is a property right protected by the Fifth Amendment.[25] The Commission's duty pursuant to § 257 of the Communications Act to eliminate market entry

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reeducating all of its potential client base, particularly since customers may choose to use CommuniGroup's service weeks or months after receiving a description of this service from their bank or alma mater.

[24] See Ruckelshaus v. Monsanto, 467 U.S. at 1010-13; Tri-Bio Labs., Inc. v United States, 836 F.2d 135, 140-1 (3d Cir. 1987); see also Cabo Distributing Co., Inc. v. Brady, 821 F. Supp. 601, 609 (N.D.Cal.1992) (expenditures of substantial funds in reliance on certificates of label approval issued by Bureau of Alcohol, Tobacco & Firearms creates property rights in label subject to Fifth Amendment protection).

[25] See Perry v. Sinderman, 408 U.S. at 601.

barriers for small businesses, and its mandate under the Regulatory Flexibility Act to consider alternatives that minimize the impact on small businesses, are an important part of these "existing rules or understandings." The Commission's mandate, which declares "off-limits" all economically productive or beneficial use of the Companies' CACs, clearly violates the existing rules and understandings embodied in relevant provisions of the Communications Act and Regulatory Flexibility Act. Thus, the Commission should reconsider its action and vacate its Order.

B. The Communications Act Does Not Authorize the Commission to Effect a Taking of the Companies' Property

The Commission's order directly implicates the Just Compensation clause of the Fifth Amendment. A government action causing a taking in an identifiable class of cases will be ruled invalid unless Congress expressly authorizes use of the takings power by a government agency.[26] "Within the bounds of fair interpretation, statutes will be construed to defeat administrative orders that raise substantial constitutional questions."[27] A policy of avoidance should take effect where "there is an identifiable class of cases in which application of a statute will necessarily constitute a taking."[28] The Communications Act provides no express authorization for the

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[26] Id. at 1446.

[27] Bell Atlantic Telephone Companies v. FCC, 24 F.3d 1441, 1445 (D.C. Cir. 1994), citing Rust v. Sullivan, 500 U.S. 173, 190-1 (1991); Edward J. DeBartalo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568, 575-78 (1988).

[28] Bell Atlantic, 24 F.3d at 1441, (citing United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 128 n. 5).

Commission to effect a taking across the broad class of CAC owners implicated by the Order. Thus, the Commission's action should be rescinded.

The Commission relies on 47 U.S.C. § 251(e)(1) for its authority in this action.[29] Section 251 generally authorizes the Commission to create or designate impartial entities to administer the telecommunications numbering system and to make numbers available. It also generally provides jurisdiction over the North American Numbering Plan to the extent it pertains to the United States. Nowhere in that section of the Act, however, is there any grant of authority for the Commission to take private property in the course of performing its general administrative function. Thus, the Commission does not have the power to take an action that will expose the U.S. Treasury to "massive and unforeseen" takings claims by the Companies and hundreds of other five digit CAC owners.[30] Accordingly, the Commission's action in taking all five digit CACs, despite the availability of grandfathering alternatives such as that proposed by VarTec, is impermissible, and should be rescinded.

C. The Commission's Action Violates the Companies' Rights Under the First Amendment

Commercial speech is defined as that speech which proposes a commercial transaction.[31] Trademarks, trade names and other symbols used to communicate information to consumers about the owner's products or services are forms of commercial speech, entitled to protection

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[29] Order at para. 11.

[30] See Bell Atlantic, 24 F.3d at 1446.

[31] Board of Trustees of SUNY v. Fox, 492 U.S. 469, 473-74 (1989).

under the First Amendment.[32] Commercial speech restrictions are scrutinized under the test set forth in Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 100 S.Ct. 2343 (1980). Under Central Hudson, regulation of commercial speech is permitted only where: (1) the speech concerns lawful activity and is not deceptive; (2) the regulation serves a substantial government interest; (3) the restriction directly advances the government's asserted interest; and (4) the restrictions are narrowly tailored and are "not more extensive than is necessary" to advance those interests.[33]

The Commission's action fails to meet this test. Even if it is assumed that the Commission's plan directly advances the government interest in making more CACs available (it is true that under the Commission's plan more CACs will be available than if the plan is not enacted), the fourth prong of Central Hudson requires the government to show that the regulatory action is in proportion to the interest asserted.[34] This requires that the action be no more extensive than necessary to further the government's interest.[35] It must be narrowly tailored to the government's interest and must not "burden substantially more speech than is necessary to

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[32] See, e.g., Friedman v. Rogers, 440 U.S. at 11; Adolph Coors Co. v. Brady, 944 F.2d 1543, 46 (10th Cir. 1991); Hornell Brewing Co., Inc. v. Brady, 819 F.Supp. 1227, 1233 (E.D.N.Y. 1993); Sambo's of Ohio v. City Council of City of Toledo, 466 F.Supp. 177, 179 (N.D.Ohio 1979).

[33] Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 100 S.Ct. at 2351.

[34] Board of Trustees v. Fox, 492 U.S. 469, 476 (1989).

[35] Central Hudson, 447 U.S. at 569-70.

further the government's interest."[36] In other words, there must be a "reasonable fit" between the government action and the government's interest, and the cost of burdening speech must be "carefully calculated" by the government.[37]

The Commission's action will completely block the Companies from using the service marks/CACs that they have been using for several years and which they have spent millions of dollars promoting. The Companies will no longer be able to communicate a message that is critical to their commercial success, i.e., the CACs which customers have come to associate with their services. Presently, the service mark/CACs used by the Companies communicate the message that customers may dial those numbers before placing a long distance call in order to utilize the long distance services of each Company, frequently at a price less than that which would be charged if the Companies' CACs were not used. Thus, that CAC service mark "proposes a commercial transaction"[38] on behalf of each Company, and is commercial speech entitled to the protection of the First Amendment. The nature of the service marks at issue here presents an even stronger case for commercial speech than most service marks because, in addition to serving as indications of the origin of each Company's services (the function of a service mark), they also communicate useful information to consumers regarding the manner in which each Company's services can be utilized.

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[36] Board of Trustees v. Fox, 492 U.S. at 477-8.

[37] Id., at 480.

[38] Board of Trustees of SUNY v. Fox, 492 U.S. at 473-74.

As explained by VarTec in its Petition for Reconsideration, VarTec's grandfathering plan comes closer to advancing the Commission's interest in making an increased number of CACs available than does the Commission's approach, and it better achieves the government's interest without the huge cost to the owners of five digit CACs that comes with the Commission's plan. For this reason, it is obvious that there is not a good "fit" between the Commission's announced objective and the means employed to reach that objective. Precedent requires the government to pursue alternatives which will achieve the government interest, while being less restrictive to commercial speech.[39] The Commission's restriction on commercial speech cannot be considered "sufficiently tailored to its goal" under the Central Hudson test since other options exist "which could advance the Government's asserted interest in a manner less intrusive to . . . First Amendment rights."[40]

The grandfathering plan proposed by VarTec advances the goals articulated by the Commission while protecting CAC owners' First Amendment rights. Thus, the Companies respectfully urge the Commission to adopt the grandfathering plan in order to prevent an unnecessary infringement of their First Amendment rights to commercial speech. At the very minimum, the Commission must "carefully calculate" the cost (to CAC owners and the public) of adopting its plan over the grandfathering plan proposed by VarTec, before blocking the

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[39] City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 113 S. Ct. 1505, 1510 n.13 (1993); Rubin v. Coors Brewing Co., 115 S.Ct. 1585, 1593 (1995); Hornell Brewing Co. v. Brady, 819 F. Supp. at 1239.

[40] Coors, 115 S. Ct. at 1593.

Companies and other CAC owners from continuing to communicate their current service marks/CACs to the public.

VI. THE COMMUNICATIONS ACT AND REGULATORY FLEXIBILITY ACT.

The Commission's Order violates the Communications Act and the Regulatory Flexibility Act by creating a new market entry barrier for small businesses and by failing to consider alternatives that will have a less onerous impact on small businesses. Pursuant to § 257 of the Communications Act, it is the duty of the Commission to eliminate market entry barriers for small businesses.[41] In adopting new regulations, the Regulatory Flexibility Act ("RFA") requires the Commission to consider significant alternatives that minimize the impact on small businesses.[42] These standards are part of the "existing rules and understandings" that allow small carriers, like the Companies, to compete against larger carriers, such as AT&T, by providing "dial-around" long distance telephone service.

Rather than provide regulatory flexibility for small businesses like the Companies, the Commission created a new market entry barrier for these small U.S. businesses by adopting a policy that completely frustrates their ability to compete against entrenched, presubscribed long distance carriers.[43] The Commission failed to adopt any alternatives minimizing the impact of its

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[41] 47 U.S.C. § 257.

[42] 5 U.S.C.§ 603, et seq.

[43] The Commission also rejected other VarTec recommendations that would promote fair competition, such as reclamation of all unused CICs, ordering LECs to educate consumers about the new CACs, and a "2-PIC" system whereby the customer chooses both an inter-LATA presubscribed carrier as well as an intra-LATA presubscribed carrier. Likewise, the Commission rejected VarTec's proposal that the Commission mandate LECs to provide

Order, such as grandfathering five digit CACs. The elimination of the Companies' five digit CACs will make it significantly more difficult for the Companies' to continue to provide service or to expand their service to other states. This violates Section 257 of the Communications Act. The Commission failed to sufficiently consider alternative plans which would minimize the impact of the CAC expansion on small interexchange carriers like the Companies. Accordingly, the Companies urge the Commission to eliminate the market entry barrier which it has improperly invoked on small interexchange carriers.

VII. CONCLUSION.

For all the foregoing reasons, the Companies respectfully request that the Commission reconsider its Order and allow them to continue to use their five digit CACs to provide long distance service to their customers.

Respectfully submitted,

CGI and COMMUNIGROUP

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June 19, 1997

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an intercept message to any customers dialing the five digit CAC during the 12 months following the transition period, thereby informing the customer of the carrier's seven digit replacement CAC, and reducing the IXC's hardship in complying with the Order. See VarTec Comments, filed June 6, 1994.

EXHIBIT ONE - A

BULK RATE
U.S. POSTAGE
PAID
CGI SERVICES

13¢ a minute

No Fees ◆ Call Anytime ◆ 24 hours a day ◆ 7 days a week

PersonalEdge℠ Plus
A Service of CGI

CGI
6950 West 56th Street
Mission, KS 66202

Call Anytime For 13¢ a minute

without canceling your existing services!

24 hours a day ◆ 7 days a week ◆ NO FEES

Compare for yourself:	8 am	11 am	5 pm	8 pm	11 pm	2 am	5 am	8 am
CGI PersonalEdge Plus	**13¢ a minute** 24 hours a day! 7 days a week!							
AT&T One Rate	**15¢**							
MCI One	**15¢**							
Sprint Sense	**25¢**			**10¢**				**25¢**

Rate comparisons are based upon AT&T, MCI and Sprint weekday promotional rates in effect Feb 1, 1997 and does not include the most frequently called number promotion. See enclosed for details.

CGI Long Distance Services

Call For Just 9¢ Per Minute
Both In-State And State-to-State
Without Canceling Your
Current Long Distance Carrier

Dear Local Telephone Customer,

With all the long distance offers out there today, how do you determine which service and company is best for you? CGI understands that everyone has different calling patterns. That's why we have developed two separate services that are designed to accommodate anyone's long distance requirements. To determine which product fits your needs the best, check your average long distance usage.

If your avg. monthly long distance usage is more than $20 use:

CGI's **9***Cents*

- You pay just 9¢ per minute
- 24 hours a day, 7 days a week
- Low monthly fee of $5.99
- Applies to all in-state as well as state-to-state calls (most other companies have a higher separate rate for in-state calling)
- All calls require a three minute minimum and are billed in whole minute increments
- All call charges appear on your regular phone bill

Forget the Dime...Use CGI's 9Cents...it makes sense!

If your avg. monthly long distance usage is less than $20 use:

CGI's **13***Cents*

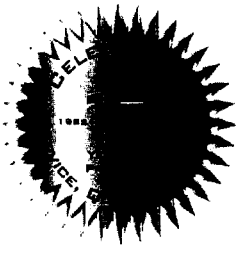
- Pay just 13¢ per minute
- 24 hours a day, 7 days a week
- No monthly fee
- Applies to all in-state as well as state-to-state calls (most other companies have a higher separate rate for in-state calling)
- Calls are billed in whole minute increments
- All call charges appear on your regular phone bill
- CGI's **13***Cents* service is only available by calling Customer Support

The One Rate That Really Saves You The Most!

For Both Services: Just Dial 10998 + 1 + the Area Code + Number
Call Anytime -- 24 Hours a Day -- 7 Days a Week -- In-State -- State-to-State
CGI's 13*Cents* service is only available by calling Customer Support at 1-800-300-4045.

Whether you make several long distance calls every month or just a few, CGI now has the custom calling plan for you. To benefit from CGI's **9***Cents* service, simply dial ***10998 +1 + Area Code + Number*** right now, or take advantage of our **13***Cents* service with no monthly fees or minimums by calling Customer Support at 1-800-300-4045. This will not switch your current long distance carrier unless you request to do so. In most local service areas, CGI's long distance service is available on your telephone right now. Why not join the countless others and try it?

Placing our customers first with service and quality has enabled CGI to now proudly celebrate 15 years in the long distance industry. We know that you will be pleased with the quality of the digital fiber-optic network utilized by CGI. Join the hundreds of thousands who benefit every month from the savings they receive with CGI's simple flat rate services. Our Customer Support Representatives are trained to answer any questions you may have about CGI's **9***Cents* or **13***Cents* services at 1-800-300-4045.



Sincerely,

D. Lemuel Jones, President

We Participate
BBB CARE
A Customer Assistance Program of the Better Business Bureau®

P.S. ***For new customers we waive your first month's per line charge, so use 9Cents today!*** If you need additional stickers, would like a free rate comparison or would like information about our low flat rate calling card please call Customer Support, toll free at **1-800-300-4045**.

CGI Long Distance Services
6950 W. 56th Street - Mission, KS 66202

Printed on Recyclable Paper
9-13CNTSXX3PC040197

Rates for direct-dial calls to all other areas, if available, will be at least 10% below AT&T's basic 1+ rates.
This special rate will not be applicable to directory assistance calls. This service is available to residential customers only